No. 08-___

IN THE

Supreme Court of the United States

NANCY BRAUS,

Petitioner,

v.

RAY M. BOWEN, J. MALON SOUTHERLAND, WILLIAM L. KIBLER, RUSSELL W. THOMPSON, JOHN J. KOLDUS, III, MAJOR GENERAL M.T. HOPGOOD, JR., DONALD J. JOHNSON, ZACK COAPLAND, KEVIN JACKSON, JAMES R. REYNOLDS, ROBERT HARRY STITELER, JR., AND MICHAEL DAVID KRENZ,

Respondents.

On Petition for Writ of Certiorari from the Tenth Court of Appeals in Waco, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Texas courts err by dismissing Nancy Braus' loss of consortium claim for the severe injury to her son as a matter of law on the sole basis that her son was not fatally injured?

Is it a violation of due process and equal protection for Texas courts to recognize claims for parental loss of consortium for parents whose children are killed, but not for parents whose children are severely injured, regardless of whether the children are minors or adults, and regardless of the quality of the relationship or the level of injury to the relationship?

Is it a violation of due process and equal protection for a judicial opinion to recognize claims for parental loss of consortium for minor children, but not for adult children, regardless of the quality of the relationship or the level of injury to the relationship, and regardless of whether the child continued to be a dependent of the parent?

Is it a violation of due process and equal protection for a judicial opinion to retroactively extinguish a cause of action after a lawsuit asserting that cause of action has been filed?

Is it a violation of due process and equal protection for a judicial opinion to extinguish a cause of action for a parents' loss of consortium without addressing any type of Constitutional analysis?

Have Texas courts violated the due process and equal protection rights of Nancy Braus in dismissing her loss of consortium case solely on the pleadings and affirming her appeal on the same basis and alternatively dismissing due to her handwritten *pro se* brief which, because it was handwritten, was four pages over the limit?

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CORPORATE DISCLOSURE STATEMENT

There are no corporate parties in this case. Upon information and belief, the respondent parties are represented by the Texas Attorney General as a result of an agreement arising out of the respondent parties' employment with Texas A&M University.

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IV. Mrs. Braus has made a good faith attempt to seek redress in the Texas courts. Her *pro se* briefing in the court of appeals raised the only issue which was necessary to raise. The outcome of the Texas court of appeals opinion was not affected regardless of the briefing because the court of appeals was bound by the Texas Supreme Court precedent in *Roberts v. Williamson* 20

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OPINIONS BELOW

This appeal arises out of a trial court order granting dismissal of Nancy Braus' loss of consortium claim for her severely injured son. A copy of that order is attached as appendix A. Mrs. Braus appealed *pro se* to the Tenth Court of Appeals in Waco, Texas. The court of appeals acknowledged that Mrs. Braus challenged the constitutionality of *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003)

and affirmed based upon that precedent. The court alternatively dismissed the appeal for failure to comply with briefing rules on her handwritten *pro se* brief. *Braus v. Bowen*, 2007 WL 2994065 (Tex. App. – Waco Oct. 10, 2007, pet. denied). A copy of the Tenth Court of Appeals opinion is attached as appendix B. Mrs. Braus pursued her appeal to the Texas Supreme Court and her Petition for Review was denied. A copy of the order denying the Petition for Review is attached as appendix C.

Upon obtaining counsel, Mrs. Braus filed a Motion for Rehearing on Petition for Review in the Texas Supreme Court. The Texas Supreme Court requested a response from the opposing side. The Motion for Rehearing on Petition for Review was denied on September 26, 2008. A copy of the order denying the Motion for Rehearing is attached as appendix D.

JURISDICTION

The Texas Supreme Court denied a discretionary Petition for Review on April 11, 2008. Petitioner sought extensions of time and timely filed a Motion for Rehearing on Petition for Review. The Texas Supreme Court denied the Motion for Rehearing on September 26, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of

life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. Amend. V.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. U.S. CONST. Amend. IX.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. Amend. XIV.

STATEMENT OF THE CASE

Mrs. Braus' son was injured after being recruited by University staff to participate in the building of the University sponsored annual Texas A&M bonfire on the College Station, Texas, campus in 1999. In the early morning on November 18, 1999, while students continued to build it, a nearly completed bonfire collapsed killing 11 undergraduate students, 1 former student and maiming and seriously injuring 27 additional undergraduate students. Mrs. Braus' son fell 55 feet and became entangled in multiple ropes. He was passed over twice during search efforts because it was assumed he would not survive

due to the severity of his injuries. He suffered serious de-gloving injuries, broken bones, and his lungs were collapsed. While he hung upside down trapped within the jumble of logs he could hear another student dying near him. Mrs. Braus joined a lawsuit to pursue compensation for the injury to her relationship with her son due to his severe physical and emotional injuries and to ensure that the underlying facts were fully disclosed and completely investigated so this would never happen again.

The issue is whether dismissal of Mrs. Braus' claim for loss of consortium was proper based solely on the Texas Supreme Court's opinion in *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003) which held that Texas does not recognize a parent's cause of action for loss of consortium for a severely injured child, even though Texas does recognize a cause of action for loss of consortium if a child is killed. Mrs. Braus filed her loss of consortium case in 2001, before the *Roberts* case was decided in 2003.

The Defendants moved to dismiss all of Mrs. Braus' claims arising out of the severe injuries to her child based solely upon the *Roberts* case. The motion did not attach evidence and requested dismissal of Mrs. Braus based solely on the pleadings. The trial court granted dismissal with prejudice on the sole basis that Mrs. Braus did not have a viable cause of action for the severe injuries to her son.

Because she was faced with a Texas Supreme Court decision which defeated her claim, she was unable to find counsel and had to pursue her appeal *pro se*. The Court of Appeals struck Mrs. Braus' brief

as too lengthy.[1] Nonetheless, the Court of Appeals understood that Ms. Braus' complaint lie with the constitutionality of the *Roberts* case. The Court of Appeals determined that it is "bound to apply clear precedent of this State's highest court." Accordingly, the trial court's judgment was affirmed. *Braus v. Bowen*, 2007 WL 2994065 (Tex. App. – Waco Oct. 10, 2007, pet. denied) (App. B.)

Mrs. Braus filed a Petition for Review with the Texas Supreme Court which was denied on April 11, 2008. (App. C.) Upon obtaining counsel willing to pursue her case, Mrs. Braus filed a Motion for Rehearing on Petition for Review in the Texas Supreme Court. The Texas Supreme Court requested a response from the opposing side. The Motion for Rehearing on Petition for Review was denied on September 26, 2008. (App. D.)

Mrs. Braus is compelled to pursue this matter to the highest court in the land not only for private redress but to preserve her inalienable rights as a parent and as a public citizen to have the facts surrounding this avoidable catastrophe fully disclosed, investigated, and evaluated in a public court of law.

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[1] Mrs.Braus' handwritten brief was 54 pages, excluding table of contents and other sections not included in a page count. If it had been typewritten, the brief could have been approximately 19 pages, well within the 50 page limit. Mrs. Braus submitted Motions requesting suspension of the technical briefing rules which were never ruled upon.

I. The private interest in the parent-child relationship is protected as a right of Constitutional dimension. A judicial opinion which extinguishes a cause of action for injury to the parent-child relationship must pass muster under Constitutional analysis for due process and equal protection.

In 2003, the Texas Supreme Court announced that Texas does not recognize a parent's cause of action for loss of consortium when a son or daughter is injured, as opposed to killed, by the wrongful conduct of another. *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003). While three justices joined in a dissenting opinion which addressed the flawed logic on each point relied upon by the majority, noticeably absent from the majority or the dissenting opinion is any reflection whatsoever on the Constitutional dimension of the parent-child relationship or any mention of Constitutional due process or equal protection.

The private interest of a parent in the children sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' *Stanley v. Illinois*, 405 U.S. 645, 651 (1976), citing *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

This Court has frequently emphasized the importance of family relationships. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399

(1923), 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and '(r)ights far more precious . . . than property rights,' *May v. Anderson*, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, 262 U.S. at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, 316 U.S. at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

Borrowing from a case involving the termination of disability payments under the Social Security Act, this Court has applied three factors to determine the nature of the process due in cases involving the parent-child relationship: the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. *See Santosky v. Kramer*, 455 U.S. 745 (1982), *citing Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)

In *Addington v. Texas*, 441 U.S. 418 (1979), the Court, by a unanimous vote of the participating Justices, declared: "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudica-

tion.'" *Id.*, at 423, *quoting In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

The "minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek v. Jones*, 445 U.S. 480, 491 (1980). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Moreover, the degree of proof required in a particular type of proceeding "is the kind of question which has traditionally been left to the judiciary to resolve." *Woodby v. INS*, 385 U.S. 276, 284 (1966). "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'" *Addington v. Texas*, 441 U.S., at 425, *quoting Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (opinion concurring in part and dissenting in part), *cert. dism'd sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972).

What value does society place on the individual liberty at issue in this case – that is to be free from interference in a parent's relationship with his son or daughter? To have due process, one must have some process. There is no process, no analysis, and no weighing of facts or factors before Texas courts simply dismiss any claim for injury to the parent-child relationship if the child is not killed. Mrs.

Braus' claim for loss of consortium for the severe injuries to her son was dismissed on the pleadings.

The majority's rationale in *Roberts* does not withstand careful analysis. In his dissenting opinion in *Roberts*, Justice Jefferson (joined by Justice O'Neill and Justice Schneider) demonstrated that none of majority's explanations – when weighed against prior decisions and the growing body of law and commentary that recognize the symbiotic nature of the parent-child relationship – provide a satisfactory justification for creating an anomaly in Texas law. *Roberts v. Williamson*, 111 S.W.3d at 124-133. Justice Jefferson addresses each point relied upon by the majority in a detailed dissent which he entitles, "Deconstructing the Court's Opinion." *Id.*

The *Roberts* case simply concludes that the relationship that a parent has with his or her child is not as worthy as other family relationships such as husband and wife. The most repugnant reference in the *Roberts* opinion is a quote from a Vermont case wherein it is suggested that a parent can replace the loss of consortium with an injured child with someone or something else:

> While "an adult is capable of seeking out new relationships in an attempt to fill in the void of his or her loss, a child may be virtually helpless in seeking out a new adult companion. Therefore, compensation through the courts may be the child's only method of reducing his or her deprivation of the parent's society and companionship."

Roberts v. Williamson, 111 S.W.3d at 118, *citing Hay v. Med. Ctr. Hosp. of Vt.*, 496 A.2d 939, 942 (Vt. 1985). If a child is severely injured, his personality

has changed he suffers from severe depression, or he is comatose and no longer communicates, there is no replacement for that relationship. What could the Vermont court have in mind? Another child? A new pet, perhaps? No. Compensation through the courts is the only method of reducing the parent's deprivation of the child's society and companionship.

In attempting to validate the analysis, the *Roberts* majority concludes that the intrinsic dependency between spouses is more worthy of protection than a parent's intrinsic dependency on the relationship with their child:

> Although parents customarily enjoy the consortium of their children, in the ordinary course of events a parent does not depend on a child's companionship, love, support, guidance, and nurture in the same way and to the same degree that a husband depends on his wife, a wife depends on her husband, or a minor or disabled adult child depends on his or her parent. Of course, it is true that such dependency may exist in a particular situation, but it is not intrinsic to the parent-child relationship as is a minor child's dependency on his or her parents and as is each spouse's dependency on the other spouse.

Roberts v. Williamson, 111 S.W.3d at 117, *citing Norman v. Mass. Bay Transp.*, 529 N.E.2d 139, 140-41 (Mass. 1988). Common experience compels the opposite conclusion. Two people can become married without having any previous significant relationship, whereas a parent-child relationship normally begins at birth and endures a lifetime. It is also much easier to terminate a marriage than it is to terminate parental rights. Moreover, child custody disputes between previously married spouses demonstrate

that most former spouses consider their relationship with their children to be more important than the marriage. The *Roberts* majority asserts that it should not recognize the loss of consortium for an injured child because an adult can "seek out a new relationship" to fill the void. It reasons that spouses have an "intrinsic" dependency that makes their relationship more worthy. However, the majority fails to acknowledge that spouses divorce and quite often seek out a new relationships. A parent attempting to find a substitute for the relationship with their child is a much more rare and heart-wrenching event.

As our parents are living longer lives, and as we begin our own paths to retirement, and the population of senior citizens increases as social security decreases,[2] is it wise to allow judicial action to erode the parental rights which the Constitution holds in

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[2] Recent reports predict that, barring any changes, the Social Security program will become insolvent--no longer able to pay promised benefits in full--around the year 2030, well within the retirement years of the baby boom generation. They also predict that the trust fund will stop being a net contributor and become instead a net claimant on the federal budget in the year 2013--much earlier than previously thought. With the world population aging, the increasing number of dependent senior citizens in all countries will become a major public policy issue that will have to be addressed continually over the next fifty years. *See* PETER A. DIAMOND, DAVID C. LINDEMAN, HOWARD YOUNG, SOCIAL SECURITY: WHAT ROLE FOR THE FUTURE? (1996). In this publication, experts in economics, actuarial science, and public policy examine such front-burner issues as the effects that variables such as mortality, births, inflation, wage levels, and pension benefits will have on the income of future retirees; the implications and effects of alternative levels of funding and financing on Social Security; and the prospects for publicly and privately financed income programs.

such high regard without even mentioning the Constitutional implications? What happens to the aging parent who is cared for by an adult son or daughter who is severely injured? Is that relationship any less dependent than the child's dependence on the parent? This is the social contract that is inherent and intrinsic to humanity. If we deny one generation that lesson, that guideline, that natural order of things, we are arbitrarily interfering with a societal norm that has taken centuries to develop. The circle has been broken. The *Roberts* case and other cases in the United States which have announced that their state does not recognize a cause of action for a parent whose child has been seriously injured fail to recognize the Constitutional importance and the sanctity of the parent-child relationship.

Just recently, the Texas Supreme Court decided to permit the children of the Fundamentalist Latter Day Saints (FLDS) to be returned to their parents because the evidence was not strong enough to warrant invading the parents' right to their children. *In re Tex. Dept. of Family and Prot. Serv.*, 255 S.W.3d 613 (Tex. 2008). What "right" is being affected that is held in such high regard in the FLDS case? It is the right to the love, companionship, and society of their children to which the Texas Supreme Court failed to give the same regard when it discarded a parent's claim for loss of consortium for injury to a child in the *Roberts* case.

II. Review of this case is necessary to resolve conflict in the state courts with regard to the necessity of Constitutional scrutiny and the level of scrutiny to apply to judicial action which affects a party's cause of action for injury to the parent-child relationship.

In 1963, governing law in the relevant jurisdictions was substantially divided over the wife's right to recover for loss of consortium. *See Am. Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980); *citing Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, 260-264 (2nd Cir. 1963), *cert. denied*, 376 U.S. 949 (1964). By 1980, a clear majority of States permitted a wife to recover damages for loss of consortium from personal injury to her husband. *Am. Export Lines, Inc. v. Alvez*, 446 U.S. at 284-285. The loss of consortium is a "clearly established" common law principle. *Id.*

A parent's claim for loss of consortium for an injured child has followed a similar pattern of increased acceptance. Of the courts that have addressed the issue, the number of states recognizing the parent's right to recover for loss of consortium for an injured child is almost equal to the number of states which do not recognize the claim. Court decisions in the states of Alaska, Arizona, Arkansas, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Montana, Nebraska, Nevada, Ohio, Rhode Island, Tennessee, Utah, Virginia, Washington, and Wisconsin (21 states) recognize a parent's claim for loss of consortium for a negligently injured son or daughter.[3]

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[3] The support for this statement is derived from cases compiled in volume 54 of the American Law Reports, Fourth

Court decisions from the states of Alabama, California, Colorado, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, New Mexico, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Texas, and Wyoming (20 states) do not recognize a claim for a parent's claim for loss of consortium for a negligently injured son or daughter.[4]

Courts are also divided on the issue of whether a parent can recover for loss of consortium if the child is an adult.[5] Logic mandates that a parent-child relationship be given the same or more respect than the marriage relationship. By the time two people are married, most people have already established an enduring relationship with their parents.

Since this case involves a dismissal on the pleadings based solely on the *Roberts v. Williamson* opinion, which involved injury to an infant, and no evidence was presented on the age, status, or level of dependency of Mrs. Braus' son or the quality of their relationship, Mrs. Braus should be entitled to make her claim subject to a rubric of Constitutional analysis. Nonetheless, to suggest that compensable consortium begins at birth and ends at age 18 is illogical and inconsistent with common sense and experience. *Howard Frank, M.D., P.C. v. Superior Court of Arizona*, 722 P.2d 955 (Ariz. 1986).

Edition, section 112. This publication states that it is updated weekly.

[4] *Id.*

[5] *Compare, Masaki v. General Motors Corp.*, 780 P.2d 566 (Haw. 1989) (not limited to minority) *with, Boucher By and Through Boucher v. Dixie Medical Center, a Div. of IHC Hospitals, Inc.*, 850 P.2d 1179 (Utah 1992) (limited to minority).

Particularly, in the case of university students where parents, such as Mrs. Braus, maintain their children as dependants, it is incongruous to allow defendants to claim the parent is not entitled to recovery because the child is an adult while at the same time the parents must comply with university contractual obligations and requirements to maintain dependant status in order to comply with insurance regulations and Internal Revenue Service requirements. *See, e.g.*, 26 U.S.C. §152(c)(3). A university student who is a dependant of his parent is typically covered by the parents' homeowner's insurance policy for any liability claims and that policy be the only practical source of money to pay or settle a claim against a student. This fact is demonstrated by the settlement of claims against student leaders who helped organize the bonfire, known as "red pots," wherein the claims were paid through the homeowners's insurance policies of their parents. *See*, Associated Press (2008, October 28), "Texas A&M to Pay Bonfire Victims" Dallas morning News, retrieved from http://www.dallasnews.com.[6] The level of dependency must be included in the Constitutional evaluation.

Arizona courts treat loss of consortium claims as one body of law, regardless of whether the plaintiff is a child or a parent. *See Barnes v. Outlaw*, 964 P.2d 484, 485-86 (Ariz. 1998) (noting that the focus of the

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[6] According to the article, the "red pots" settled in 2004,but Texas A&M University recently entered into a settlement which was reported on October 28, 2008. Texas A&M University is a self-insured entity and held a liability policy with National Union Fire Insurance Company of Pittsburgh, Pennsylvania at the time the bonfire collapsed in 1999. It was not reported whether National Union ultimately funded any part of the defense or recent settlement of claims.

loss of consortium cause of action has shifted over time from a property right in the services of another to the intangible values of a relationship, such as companionship and affection). A cause of action for loss of consortium exists when the parent or child suffers a severe, permanent, and disabling injury that substantially interferes with the victim's capacity to interact with his family in a normally gratifying way. *See Dobek v. Wal-Mart Stores, Inc.*, 2007 WL 2069832 *9 (D. Ariz 2007); *citing Pierce v. Casas Adobes Baptist Church*, 782 P.2d 1162, 1165 (Ariz. 1989); *Villareal v. State, Dept. of Transp.*, 774 P.2d 213, 219 (Ariz. 1989). Evidence of a significant interference in the parent-child relationship must exist; however, the injury need not be the functional equivalent of death or even be categorized as "catastrophic." *Id.*

The freedom from interference with the parent-child relationship is a Constitutionally protected liberty. When that relationship is injured due to the negligent conduct of another, the injury should be subject to redress. The existence of a cause of action that exists by virtue of the well-established common law of the United States cannot be judicially extinguished as it was in Mrs. Braus' case. Instead, the parent's cause of action should be evaluated by the appropriate level of Constitutional scrutiny as applied on a case by case basis.

A parent's right for companionship, care and counsel from his or her child is an essential right which is well-established in the common law of the United States. *Roberts v. Williamson* should be overruled as unconstitutional and Mrs. Braus' claim for loss of consortium for the injury to her child should be reinstated.

III. Texas courts have violated due process and equal protection by recognizing a cause of action for loss of consortium for the parent of a child who is killed, but not for the parent of a child who is seriously injured, and by retroactively extinguishing a Constitutionally protected property right without cause.

Texas recognizes a cause of action for a parent's loss of consortium when their son or daughter is killed. *Roberts v. Williamson*, 111 S.W.3d at 120, n. 5; TEX. CIV. PRAC. & REM. CODE § 71.004. In an unprecedented manner, the *Roberts* case attempts to rely upon the fact that the legislature has enacted a statute which provides for a claim of loss of consortium in a wrongful death case as evidence that there is no claim for loss of consortium when the injury does not result in death. The analysis is illogical and arbitrary.

The *Roberts* analysis literally extinguishes a claim based upon whether a child survives the ordeal or dies because of it. It sets forth two classes of parents – those whose children survive and those whose children do not survive – and treats them differently without any logical basis, without cause, and without any Constitutional analysis.

Not only does the *Roberts* opinion ignore the right to equal protection under the law, its analysis guarantees unequal protection. While other courts have looked to their own state's wrongful death statute for guidance, those courts have determined that whether the claim is permitted under the wrongful death is a positive indication as to whether the same claim can be made for a personal injury. *See, e.g., Siciliano v Capitol City Shows, Inc.*, 475

A.2d 19 (NH 1984) (the court, in the course of rejecting the loss of filial consortium cause of action, noted that the state's wrongful death statute did not provide for damages based upon losses suffered by surviving relatives of a child); and *Reben v Ely*, 705 P.2d 1360 (Ariz. 1985) (the court looked to cases involving interpretation of the state's wrongful death statute, and to the statute's provisions for setting damages, as support for recognition of the loss of filial consortium cause of action.)

In an analogous context, several jurisdictions have held that it would be anomalous to sustain a recovery for a child's loss of consortium when the parent dies but to deny one when the parent lies comatose or is seriously injured. *See, e.g., Rosen v. Zorzos*, 449 So.2d 359 (Fla.App. 5 Dist.1984); *Theama v. City of Kenosha*, 344 N.W.2d 513 (Wis. 1984); *Ueland v. Reynolds Metals Co.*, 691 P.2d 190 (Wash. 1984); *Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Co.*, 335 N.W.2d 148 (Iowa 1983) (reversing *Weitl* because Iowa Code § 613.15 already included parental consortium damages but upholding its rationale); *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981); *Berger v. Weber*, 303 N.W.2d 424 (Mich. 1981); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980).

The *Roberts* decision had to overturn earlier Texas cases in order to find that Texas did not recognize the parent's loss of consortium claim for an injured child. *Roberts v. Williamson*, 111 S.W.3d at 117, *disapproving Schindler Elevator Corp. v. Anderson*, 78 S.W.3d 392, 414 (Tex.App.– Houston [14th Dist.] 2001, pet. denied); *Enochs v. Brown*, 872 S.W.2d 312, 322 (Tex.App. – Austin 1994, no writ); and *Parkway Hosp., Inc. v. Lee*, 946 S.W.2d 580, 590 (Tex.App.-

Houston [14th Dist.] 1997, writ denied). The *Roberts* case was decided while Texans still relied upon the earlier court decisions and after Mrs. Braus had filed her claim for loss of consortium.

The retroactive application of *Roberts* to extinguish Mrs. Braus' pending action is an unconstitutional deprivation of a Constitutionally protected property right. The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) (horse training license); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (disability benefits). Comparatively, the right not to be subject to loss of consortium claims by parents when a defendant negligently injures a child is not a property interest entitled to Constitutional protection; the defendant would not have acted differently having known that the cause of action would be retroactive from the time it was enacted. *Leibovich v. Antonellis*, 574 N.E.2d 978 (Mass. 1991).

The due process and equal protection for the issues raised in this Petition are also guaranteed to Mrs. Braus pursuant to The Universal Declaration of Human Rights, Dec. 10, 1948, General Assembly of the United Nations, Art. 6 (Everyone has the right to recognition everywhere as a person before the law); Art. 7 (All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination); Art. 8 (Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution

or by law); Art. 12 (No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks), and; Art. 16 (3) (The family is the natural and fundamental group unit of society and is entitled to protection by society and the State). The disparity and conflicting treatment of Constitutionally protected personal rights throughout the United States has gained increased importance in today's climate of heightened national security.

The *Roberts* case turns equal protection on its head by using the Texas Wrongful Death statute, which permits parental loss of consortium claims, as a basis to deny parental loss of consortium claims in non-fatal cases in pending as well as future cases.

IV. Mrs. Braus has made a good faith attempt to seek redress in the Texas courts. Her *pro se* briefing in the court of appeals raised the only issue which was necessary to raise. The outcome of the Texas court of appeals opinion was not affected regardless of the briefing because the court of appeals was bound by the Texas Supreme Court precedent in *Roberts v. Williamson*.

Mrs. Braus does not have, nor does she regularly use, a computer. Since she could not find an attorney to represent her, she submitted her briefing to the court of appeals in handwritten form. The Court of Appeals struck the brief as being too long. If the brief had been typewritten, it would have been much less than 54 pages. The remaining tabbed portions of

the brief were appendices for which there was a handwritten table of contents at the front of the brief.

Here, there is no question that the court of appeals recognized the only issue in this case which was dismissed on the pleadings – whether the *Roberts v. Williamson* case precludes Mrs. Braus' claim for loss of parental consortium for a non-fatal injury to her child The court of appeals fully addressed the only substantive issue in this case by stating that its decision is bound by the precedent of *Roberts v. Williamson* unless and until it is overruled.

CONCLUSION AND PRAYER

Nancy Braus requests this Court grant the Petition for Writ of Certiorari and to reverse and remand this case to the trial court for further proceedings.

Respectfully submitted,

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December 29, 2008

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF
BRAZOS COUNTY, TEXAS
361st Judicial District

[Filed JUN 20, 2006]

Cause No. 03-001246-CV-361

IN RE: BONFIRE INJURY CASES

ORDER GRANTING DEFENDANTS' MOTION TO RECONSIDER "DEFENDANTS' MOTION FOR SUMMARY JUDGMENT/MOTION TO DISMISS AGAINST PLAINTIFF NANCY BRAUS

On this, the 20th day of June, 2006, came Defendants Ray M. Bowen, J. Malon Southerland, William L. Kibler, Russell W. Thompson, James R. Reynolds, Robert H. Stiteler, Jr., John Koldus, III, Major General M.T. Hopgood, Jr., Donald J. Johnson, Kevin Jackson, Michael Krenz and Zack Coapland's "Motion to Reconsider 'Defendants' Motion for Summary Judgment/Motion to Dismiss Against Plaintiff Nancy Braus'" and the Court, after examining said Motion, hearing the arguments and reviewing the pleadings herein, is of the opinion that Defendants' Motion should he in all things GRANTED.

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that Defendants Ray M. Bowen, J. Malon Southerland, William L. Kibler, Russell W. Thompson, James R. Reynolds, Robert H. Stitcler,

Jr., John Koldus, III, Major General M.T. Hopgood, Jr., Donald J. Johnson, Kevin Jackson, Michael Krenz and Zack Coapland's "Motion to Reconsider 'Defendants' Motion for Summary Judgment/Motion to Dismiss Against Plaintiff Nancy Braus" is GRANTED and the previous order of the Court denying the "Defendants' Motion for Summary Judgment and Motion to Dismiss against Plaintiff Nancy Braus" is hereby withdrawn. Defendants' Motion for Summary Judgment/Motion to Dismiss is granted and the Plaintiffs, Nancy Braus, cause of action against Defendants Ray M. Bowen, J. Malon Southerland, William L. Kibler, Russell W. Thompson, James R. Reynolds, Robert H. Stiteler, Jr., John Koldus, III, Major General M.T. Hopgood, Jr., Donald J. Johnson, Kevin Jackson, Michael Krenz and Zack Copland are dismissed with prejudice to the refiling of same and hereby severed from this consolidated action. Further, all costs are taxed against the Plaintiff.

Signed and Entered this 20th day of June, 2006.

/s/ [Illegible]
Judge Presiding

APPENDIX B

IN THE TENTH COURT OF APPEALS

No. 10-06-00226-CV

NANCY BRAUS,

Appellant,

v.

RAY M. BOWEN, J. MALON SOUTHERLAND, William L. Kibler, Russell W. Thompson, John J. Koldus, III, Major General M.T. HOPGOOD, JR., DONALD J. JOHNSON, ZACK COAPLAND, KEVIN JACKSON, JAMES R. REYNOLDS, ROBERT HARRY STITELER, JR., AND MICHAEL DAVID KRENZ,

Appellees.

From the 361st District Court
Brazos County, Texas
Trial Court No. 03-001246-CVA-361

MEMORANDUM OPINION

This is an appeal by Nancy Braus, the mother of Dominic Braus, an adult who was injured in the collapse of the bonfire being built on the Texas A&M campus in 1999. As a result of that catastrophic event, many lawsuits were filed. One of those suits is now the subject of this appeal. While the suit was pending, the Texas Supreme Court decided *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003). In *Roberts*, the Texas Supreme Court held that a parent does not have a claim which can be asserted against those alleged responsible for the injuries to an adult child.

As a result of that holding, the trial court, either by summary judgment motion or by motion to dismiss, has disposed of Nancy Braus's claims for the injuries to her adult son as a result of the collapse.

Though initially represented by counsel, counsel withdrew from the representation and Nancy Braus proceeded to pursue her claims acting as her own attorney. First the trial court and parties, and now this Court, have struggled to allow Ms. Braus to have a meaningful opportunity to assert her legal claims and positions at hearings and on appeal. This Court has spent an inordinate amount of time to try to keep the various appeals in which Nancy Braus is involved properly separated because the orders disposing of her claims as to the various defendants were not all rendered and severed from the primary suit, which was designated "*In re Bonfire*" at the trial court level, at the same time thus generating multiple appeals as to the various parties. Notwithstanding the efforts of the trial court and this Court, confusion has been the norm and precision and compliance with the rules has been in short supply.

In this proceeding, while designating herself as appellee, Nancy Braus has filed a voluminous document, well in excess of the 50 page limit, which she contends is her brief in this appeal. *See* TEX. R. APP. P. 38.4. We strike this brief and dismiss Nancy Braus's claims because we have previously warned her not to file another non-compliant brief. *See* TEX. R. APP. P. 38.9(a). That is the procedure that the appellees, defendants in the trial court, are entitled to.

Accordingly, this appeal is dismissed.

Alternatively, we apply Rule 2 of the Texas Rules of Appellate Procedure to expedite the disposition of

this appeal. We will not require the Appellees to file a brief in response to the brief filed by Nancy Braus, nor will we require the case to be "submitted." From the brief filed on September 18, 2007, we are able to discern that Nancy Braus's complaint on appeal is that the *Roberts v. Williamson* case is unconstitutional. As an intermediate court, however, we are bound to apply the clear precedent of this State's highest court. Accordingly, it is the opinion of this Court that the trial court's judgment determining that Nancy Braus does not have a cause of action for the injuries sustained by her adult son is correct and should be affirmed.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Vance, and
Justice Reyna

Appeal dismissed or alternatively affirmed
Opinion delivered and filed October 10, 2007
[CV06]

APPENDIX C

THE SUPREME COURT OF TEXAS

07-0958

NANCY BRAUS

v.

RAY M. BOWEN, et al

ORDERS ON PETITIONS FOR REVIEW
Orders Pronounced April 11, 2008

THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

07-0958 Nancy Braus v. Ray M. Bowen, et al.; from Brazos County; 10th district (10-06-00226-CV, ___ SW3d ___, 10-10-07) respondents' motion to dismiss, dismissed as moot.

APPENDIX D

THE SUPREME COURT OF TEXAS

07-0958

NANCY BRAUS

v.

RAY M. BOWEN, et al

ORDERS ON MOTIONS FOR REHEARING
Orders Pronounced September 26, 2008

THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

07-0958 Nancy Braus v. Ray M. Bowen, et al.; from Brazos County; 10th district (10-06-00226-CV, ___ SW3d ___, 10-10-07).